

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 21, 2021

Sheila T. Reiff
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 2020AP538-CR
STATE OF WISCONSIN**

Cir. Ct. No. 2015CF1484

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DOMINIQUE D. BRYANT,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Racine County: MARK F. NIELSEN, Judge. *Affirmed.*

Before Reilly, P.J., Gundrum and Davis, JJ.

Per curiam opinions may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

¶1 PER CURIAM. Dominique Bryant appeals from a judgment convicting him of misdemeanor theft and an order denying his WIS. STAT. RULE 809.30 (2019-20)¹ postconviction motion alleging that his constitutional right to a speedy trial was violated. We agree with the circuit court that Bryant’s right to a speedy trial was not violated. We affirm.

¶2 The speedy trial issue was first discussed in Bryant’s WIS. STAT. RULE 809.32 no-merit appeal. *State v. Bryant*, No. 2019AP28-CRNM, unpublished op. and order (WI App Oct. 30, 2019). After considering the no-merit report and independently reviewing the record, we concluded that the case presented “an arguably meritorious claim that Bryant was denied his constitutional right to a speedy trial.” *Id.* at 2. Therefore, we rejected the no-merit report, and the case returned to the circuit court to address the speedy trial issue via a WIS. STAT. RULE 809.30 postconviction motion. After a hearing, the circuit court denied Bryant’s postconviction motion.

¶3 “Both the Sixth Amendment to the United States Constitution and article I, section 7 of the Wisconsin Constitution guarantee an accused the right to a speedy trial.” *State v. Urdahl*, 2005 WI App 191, ¶11, 286 Wis. 2d 476, 704 N.W.2d 324 (citation omitted). We review de novo as a question of law whether Bryant was denied his constitutional right to a speedy trial. *See State v.*

¹ All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

The circuit court’s order denying Bryant’s postconviction motion is erroneously captioned as denying a WIS. STAT. § 974.06 (2019-20) motion. The proceedings in the circuit court were held pursuant to WIS. STAT. RULE 809.30 as directed in *State v. Bryant*, No. 2019AP28-CRNM, unpublished op. and order (WI App Oct. 30, 2019).

Leighton, 2000 WI App 156, ¶5, 237 Wis. 2d 709, 616 N.W.2d 126. We accept the circuit court’s findings of fact unless they are clearly erroneous. *Id.*

¶4 A four-part test is applied to determine if the defendant’s constitutional right to a speedy trial has been violated. *Urdahl*, 286 Wis. 2d 476, ¶11. The test considers:

(1) the length of delay; (2) the reason for the delay; (3) the defendant’s assertion of his right; and (4) prejudice to the defendant. The right to a speedy trial is not subject to bright-line determinations and must be considered based on the totality of circumstances that exist in the specific case. Essentially, the test weighs the conduct of the prosecution and the defense and balances the right to bring the defendant to justice against the defendant’s right to have that done speedily. The only remedy for a violation of the right to a speedy trial is dismissal of the charges.

Id. (citations omitted).

¶5 After applying the four-factor test, the circuit court rejected Bryant’s speedy trial violation claim.

¶6 On appeal, Bryant argues that the circuit court erred when it excluded from its speedy trial delay calculation the 297-day period between the time the charges were filed, October 9, 2015, and the time when the circuit court received Bryant’s letter demanding a speedy trial, August 1, 2016. We must first determine when Bryant’s speedy trial demand was effective. A speedy trial demand may not be made until after the information is filed. WIS. STAT. § 971.10(2)(a). Although the circuit court found that Bryant asserted his speedy trial right by letter filed in the circuit court on August 1, 2016, that demand was ineffective because the information had not yet been filed. Bryant’s speedy trial request was made by his counsel on October 12, 2016, the same date the information was filed. Bryant’s trial started on September 26, 2017.

¶7 We accept the State’s concession that the time from charging to the speedy trial demand is included in the length of the delay to trial. The first period of delay occurred between charging on October 9, 2015, and the effective speedy trial demand on October 12, 2016, a delay in excess of twelve months that is presumptively prejudicial. *Urdahl*, 286 Wis. 2d 476, ¶12. Notwithstanding this presumption, the other *Urdahl* factors (the reason for the delay, the defendant’s assertion of the speedy trial right, and prejudice to the defendant) must still be applied to determine whether a speedy trial violation occurred. *Id.*, ¶¶11-12.

¶8 We next consider the reasons for the approximately twenty-three month delay between the October 9, 2015 charging and the September 26, 2017 trial. Different reasons are assigned different weights.

A deliberate attempt by the government to delay the trial in order to hamper the defense is weighted heavily against the State, while delays caused by the government’s negligence or overcrowded courts, though still counted, are weighted less heavily. On the other hand, if the delay is caused by something intrinsic to the case, such as witness unavailability, that time period is not counted. Finally, if the delay is caused by the defendant, it is not counted.

Id., ¶26 (citations omitted).

¶9 Although charged on October 9, 2015, Bryant did not demand a speedy trial until October 12, 2016. Before the speedy trial demand, Bryant was mistakenly returned to prison, which delayed the preliminary examination and other proceedings for five weeks. A three-month delay occurred between the October 12, 2016 speedy trial demand and the first trial date in January 2017. The January 2017 trial date had to be moved to May, four months later, because the

State could not locate the complaining witness who was living out-of-state.² The May 2017 trial date had to be moved four months due to a conflict with the circuit court's schedule arising from the court's need to attend a judicial education program required of Wisconsin judges. Bryant's trial started on September 26, 2017.

¶10 We conclude that none of these delays constitutes “[a] deliberate attempt by the government to delay the trial in order to hamper the defense” which would “weight[]heavily against the State.” *Id.* (citation omitted). Bryant waited over a year to demand a speedy trial, which does not count against the State. The delay of five weeks attributable to Bryant's mistaken return to prison does not carry great weight under the totality of the circumstances. *Id.*, ¶¶11, 26. We are not persuaded that the ninety days between the October 2016 speedy trial demand and the first scheduled trial date of January 10, 2017 constitutes a speedy trial violation, particularly because WIS. STAT. § 971.10(2)(a), the statutory speedy trial provision, envisions ninety days to hold the trial. The four-month delay attributable to the State's inability to locate a witness who lived out-of-state is not counted. *Urdahl*, 286 Wis. 2d 476, ¶26. Finally, the four-month trial delay attributable to the circuit court's calendar is also “weighted less heavily” against the State. *Id.* (citation omitted).

¶11 We next consider Bryant's assertion of his speedy trial right. The circuit court found that prior to August 1, 2016, when he made an ineffective speedy trial demand, Bryant did not express any urgency about his case. Bryant

² At this point in the case, the circuit court granted Bryant bond due to a statutory violation of his speedy trial right. WIS. STAT. § 971.10(4).

made an effective speedy trial demand two months later. Under the totality of the circumstances, this factor does not enhance Bryant's speedy trial violation claim. *Id.*, ¶11.

¶12 We turn to whether Bryant has established that he was prejudiced by the delay. To do so, we address the interests the speedy trial right protects: “prevention of oppressive pretrial incarceration, prevention of anxiety and concern by the accused, and prevention of impairment of defense.” *Id.*, ¶34 (citation omitted). Because Bryant was incarcerated in another case for the entire time the charges in this case were pending, the oppressive pretrial incarceration concern carries less weight. *Id.* The circuit court found that Bryant experienced anxiety about whether his witnesses would be available for his defense at trial. However, Bryant's defense was believed, and he was acquitted of the armed robbery with use of force charge and convicted of misdemeanor theft, minimizing any claim that his defense was impaired by the delay. *Id.* Bryant has not cited any authority for the proposition that his anxiety about limited access to institutional programming due to the pending charges constitutes the type of anxiety contemplated by the prejudice analysis.

¶13 The *Urdahl* court's balancing of all four factors is instructive to our resolution of Bryant's case. As in *Urdahl*, Bryant did not assert a speedy trial right for an extended period after his case was filed. *Id.*, ¶37. As in *Urdahl*, Bryant “has shown only minimal prejudice” given that he was incarcerated on another case during the entire time the case before us was pending. *Id.* None of the challenged periods of delay is heavily weighted against the State. *Id.* Finally, in Bryant's case, the overall delay from charging to trial was approximately twenty-three months, consisting of twelve months before he made an effective

speedy trial demand and eleven months of other delays that either did not count or were not weighted heavily against the State. The remaining months of delay are significantly less than the twenty and one-half months attributable to the State in *Urdahl*. *Id.* The *Urdahl* court concluded that the delay in that case when balanced with other factors did not yield a speedy trial violation. *Id.* Based on the totality of the circumstances in Bryant’s case, and after applying the four-part test, we conclude that Bryant’s right to a speedy trial was not violated. *Id.*, ¶11. We affirm the circuit court’s decision denying Bryant’s postconviction motion alleging a constitutional speedy trial violation.

¶14 Bryant next complains that the circuit court erred at a January 2017 status conference when it denied his request to dismiss the charges against him due to a speedy trial violation. If it was error by the circuit court to address Bryant’s speedy trial claim prior to trial, which we do not decide, then Bryant invited that error by asking the circuit court at a status conference to dismiss the case on this basis. See *Shawn B.N. v. State*, 173 Wis. 2d 343, 372, 497 N.W.2d 141 (Ct. App. 1992) (discussing invited error). We do not review invited error. *Id.*³

By the Court.—Judgment and order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

³ Additionally, we observe that even though the circuit court rejected Bryant’s speedy trial violation claim, the court fully addressed that claim postconviction. Bryant was not deprived of consideration of his speedy trial right violation claim.

